Petition

81-1236

NO. .....

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

ROWENA OWEN GARNER,

Defendant/Petitioner.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

A. Was petitioner denied due process of law, the subpoena power of the court, and the effective assistance of counsel by the District Court's refusal to grant use immunity to a defense witness who refused to testify (asserting his Fifth Amendment privilege)?

B. Does Title 18 U.S.C. § 6003 constitutionally require a defendant in a criminal case to first request immunization of a defense witness from the prosecution before applicaton can be made to the trial court for such immunity?

II

A. Was petitioner legally convicted where a timely notice of appeal was filed prior to trial and the District Court proceeded to trial over timely objections?

B. Is the denial of a Motion to Dismiss for grand jury irregularities a "final order" within the purview of 28 U.S.C. § 1291?

C. Was petitioner denied due process of law when she was not permitted access to grand jury records, nor allowed to present evidence in support of her challenge to the indictment process, by reason of grand jury irregularities.

III

A. Was petitioner denied due process of law and

illegally convicted as an aider and abettor of alleged "wire fraud" and "interstate travel" charges where there was no competent evidence of any telephone call in furtherance of any scheme to defraud and no interstate travel on the part of petitioner?

B. Was the decision of the Court of Appeals in conflict with the decisions of the same circuit and other circuits in this respect?

C. Was the standard of appellate review inappropriate under the guidelines set forth in *Jackson v. Virginia* (1979), 443 U.S. 307, 61 L. Ed. 2d 560?

IV

Was petitioner denied a fair trial and due process of law where the trial court stressed to the jury, after several hours of late night deliberation, the expense of trial and concomitant importance of the jury's reaching a verdict? (Did the trial court exceed the permissible limits of coercive instructions sanctioned in *Allen v. United States* (1896), 164 U.S. 942, 17 S. Ct. 154?)

PARTIES TO THE PROCEEDING

The indictment returned by the grand jury for the District of Nevada charged Roy Garner, Sherman Dennis and Rowena Garner with the crimes of wire fraud (18 U.S.C. § 1343) and interstate travel in furtherance of an unlawful activity (18 U.S.C. §§ 1952 and 2314). Sherman Dennis was given immunity and testified for the government. Co-defendant Roy Garner took pretrial appeals and petitioned for a writ of certiorari (*United States v. Garner* (1981), 632 F.2d 758, *cert. denied,* ..... U.S. ..... , 101 S. Ct. 1373) and thereafter entered a plea of guilty to two counts of the indictment in the Central District of California, pursuant to Rule 20 of the Federal Rules of Criminal Procedure, and was granted probation.

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PETITION FOR WRIT OF CERTIORARI

This is a petition of ROWENA GARNER for a writ of certiorari to review the order made by the United States Court of Appeals for the Ninth Circuit affirming the judgment of conviction both on the pretrial and post-conviction appeals (the pretrial appeal is the Ninth Circuit's number 79-1805; the post-conviction appeal is number 80-1147), and to review the order of the appellate court dated November 16, 1981 denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, filed September 14, 1981 (*United States v. Rowena Owen Garner,* U.S.C.A. 9, No. 79-1805 and No. 80-1147) has not yet been reported. A copy of that opinion is provided herewith in the appendix to this brief (Appendix "A" - appendix pp. 1 - 15). Also attached is a copy of the order of November 16, 1981, denying the Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix "B" - appendix p. 16), and a copy of the order of December 3, 1981, granting the Application for a Stay of Mandate to January 2, 1982 (Appendix "C" - appendix p. 17).

JURISDICTION

On September 14, 1981, the Court of Appeals for the Ninth Circuit, in *United States v. Rowena Owen Garner,* affirmed her conviction, thereby reviewing pretrial and post-conviction appeals (Appendix "A").

On November 16, 1981, a timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied (Appendix "B").

On December 3, 1981, the mandate was ordered stayed until January 2, 1982, for the purpose of allowing petitioner to bring this petition (Appendix "C").

Jurisdiction is conferred on this Court by virtue of 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V (in part)

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . ; . . . nor be deprived of life, liberty or property without due process of law; . . . . "

United States Constitution, Amendment VI (in part)

> "In all criminal prosecutions, the accused shall enjoy the right . . . ; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. § 1291

> "The courts of appeal shall have jurisdiction from all final decisions of the district courts of the United States."

18 U.S.C. § 6003(b) (in part)

> "A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment–(1) the

testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

STATEMENT OF THE CASE

On April 26, 1979, a seven-count indictment was returned by a grand jury, charging Rowena Garner with aiding and abetting Roy Garner and Sherman Dennis with the crimes of wire fraud (in violation of 18 U.S.C. § 1343) and interstate travel in furtherance of an unlawful activity (in violation of 18 U.S.C. §§ 1952 and 2314)[1].

The blackjack games in which the cheating was involved took place at Harrah's Casino in Lake Tahoe, Nevada, on September 30, December 27, and December 28, 1974. A number of grand juries, commencing in early January, 1975, had heard evidence in the matter, culminating in the indictment of April 26, 1979.

On November 6, 1979, a motion to dismiss the indictment for grand jury irregularities was made on the ground that a quorum of grand jurors voting to return the indictment had not heard the evidence presented, requesting an order of disclosure of the jurors in attendance and voting at the various grand jury proceedings held between 1975

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[1]The indictment was predicated on an alleged violation of Nevada Revised Statutes § 465.080, which makes it an offense for a person to use marked cards or employ cheating devices while playing any licensed gambling game; and on Nevada Revised Statutes § 195.020, designating an aider/abettor as a principal.

and 1979. A previous order of the District Court requiring disclosure of some of this information resulted in the government's filing (on November 21, 1979) a transcript of the grand jury proceedings of April 26, 1979. That transcript showed an unfamiliarity on the part of the jurors with the facts of the case before them, and supported the defense contention that there was need for disclosure of the attendance and voting records of the jurors. Trial was originally scheduled to commence as to all defendants on December 4, 1979. The motion to dismiss was denied by the trial court on November 30, 1979, by minute order, without hearing.

After co-defendant Roy Garner's motions to dismiss for double jeopardy and grand jury irregularities were denied, he filed a Notice of Appeal on that date, resulting in his severance. The trial of Rowena Garner and Dennis was then continued to December 7, 1979, during which time Dennis worked out a plea bargain with the United States Attorney, resulting in Dennis's severance, and the impaneling of the jury for Rowena on that date. Prior to the commencement of trial on December 10, Rowena filed a Notice of Appeal and objected to the jurisdiction of the court to proceed (see appendix pp. 3 and 4, n. 2, opinion of the Court of Appeals).

Rowena and Roy Garner were at all times in question residents of Reno, Nevada. Rowena never made any telephone calls, nor did she travel outside of Nevada during the period in question. Her " . . . conviction for wire fraud and interstate travel was based on alleged telephone conversations between Roy and Dennis in December of 1974, and upon Dennis's travel from California to Nevada to play

blackjack" (appendix p. 3, opinion of the Court of Appeals).

After the prosecution had rested, defense counsel announced that it was his intention to call Roy Garner as a defense witness. He stated that he was informed by Garner's counsel that Garner would assert his Fifth Amendment privilege against self-incrimination. The court then inquired of Garner's counsel, Mr. Perry, whether he was familiar with the inquiries that might be made by defense counsel, and Mr. Perry said that he was. Mr. Perry then stated, in response to the court's question as to whether Garner would claim the Fifth Amendment privilege, that "[w]ithout a grant of immunity, I would advise him to claim the Fifth Amendment available to him." Defense counsel then called Roy Garner for preliminary questioning outside the presence of the jury.

Garner refused, on Fifth Amendment grounds, to answer questions as to whether he knew a Wilma Rogers, whether he entered into a scheme to defraud Harrah's in the year 1974, and whether it was his intention to continue to assert the privilege to any further questions. Defense counsel then moved the court for an order conferring "use immunity" on Garner "so that he may be free to testify on behalf of the defendant without fear of being prosecuted for his testimony," relying on the equal protection guarantees of the due process clause and the right of the defendant to secure witnesses to testify in her behalf, as well as the court's inherent power. Defense counsel's request for a grant of use immunity to Garner was denied.

The jury was finally instructed in the early evening of December 21, 1979. After several hours of deliberation, the jury was brought in at 10:50 p.m. to inquire about its

progress, and the foreman reported that progress was "slow." Although no verdict had been reached on any of the three remaining counts, the foreman indicated that further deliberations might enable them possibly to get a verdict. Before sending the jury back for deliberation, the court then stated the following to the jury:

> "The one thing I do want to stress to the members of the jury, and if I am able to do this, I know you all realize the expense of trial to everyone involved in it, to both sides, to yourselves. I know that all of you realize the importance of the case to the defendant and to the government, and that it is an important case, that it be resolved . . . .
>
> [And after a brief sidebar conference]:
>
> "Well, I know you're fine people and doing the best you can, and I will ask you at this time to retire to the jury room and continue your deliberations and endeavor to reach a verdict if you can, and we'll stand by and see what progress is made." (See appendix p. 14, opinion of the Court of Appeals.)

Thereafter, after the jury had retired, counsel for petitioner objected to the statement of the court regarding the expense of trial and investment of time and effort of all parties, urging that it was improper and inappropriate in the weighing of the evidence concerning the defendant, and in light of the fact that the court had failed to advise the jurors not to surrender their honest opinions, that a mistrial be declared. This motion was denied.

Although the jury was impaneled on December 7, 1979, the first witness was not called until December 10, 1979, after the Notice of Appeal had been filed. On December 22, 1979, the District Court having earlier granted a motion for judgment of acquittal as to Count VI, the jury found Rowena Garner guilty of wire fraud and interstate travel as charged in Counts I and II and not guilty of interstate travel as charged in Count V.

On March 3, 1980, Rowena Garner's motions for acquittal, for a new trial and an arrest of judgment were denied, and she was sentenced to a term of two years in the custody of the Attorney General as to Count I, and three years as to Count II.[2] Execution of sentence as to Count II was suspended, and she was placed on probation for four years.

A timely Notice of Appeal was filed on March 5, 1980, and the court ordered her released on bond pending appeal. She remains free on bond.

ARGUMENT

I

A. The Petitioner Was Denied Due Process Of Law, The Subpoena Power Of The Trial Court, And The Effective Assistance Of Counsel By The District Court's Refusal To Grant Use Immunity To A Defense Witness Claiming His Privilege

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[2] As previously indicated, in late 1981 co-defendant Roy Garner entered a Rule 20 plea to Counts I and II, was fined $1,000, and was placed on probation for three years.

Against Self-Incrimination;

B. The Appellate Court's Interpretation of 18 U.S.C. § 6003, Requiring A Defendant In A Criminal Case To First Request Immunization Of A Defense Witness From The Prosecution Before Application Can Be Made To The Trial Court For Such Immunity, Is Unconstitutional And Unconscionable.

The prosecution's chief witness had been granted immunity by the government in exchange for his testimony. The position of the Court of Appeals seems to be that a defendant in a criminal case must first apply to the government for a grant of immunity to a witness who claims his privilege against self-incrimination before the defendant can apply to the court for an order assuring defendant his right to secure the testimony of witnesses. To state the proposition is to state its absurdity. What the Court of Appeals in this case has said is that the defendant in a criminal case must first apply to the *executive* branch of the government in order to obtain that which is due him from the *judicial* branch by virtue of the Constitution.

Due process includes the right of a defendant to access to evidence that is available to the prosecution and prevents prosecution suppression of evidence which is material to guilt or innocence. *Brady v. Maryland* (1964), 373 U.S. 83, 104; *Roviaro v. United States* (1957), 353 U.S. 53, 60, 62. In addition to the right to access to evidence is the right to compulsory process of the court. That right, too, is a fundamental element of due process. *Washington v. Texas* (1967), 388 U.S. 14, 19; see *United States v. Nixon* (1974),

418 U.S. 683, 709.

Where the prosecution relies upon the immunized testimony of one or more witnesses to establish its case against a defendant, due process requires that immunity be afforded to defense witnesses in similar circumstances. See *Earl v. United States* (D.C. Cir. 1966), 361 F.2d 531; *cf. United States v. Morrison* (3rd Cir. 1966), 535 F.2d 223, 229.

In the instant case, the Court of Appeals rejected the argument presented by this petitioner on the basis of *United States v. Carman* (C.A. 9, 1978), 577 F.2d 556. The Court of Appeals here cited the *Carman* case for the proposition that a defendant must show that the immunity grant would have resulted in favorable testimony. The *Carman* case, however, does *not* stand for that proposition. Rather, *Carman* requires a showing that the Fifth Amendment would be relied upon by the witness as a prerequisite to the granting of immunity (*Carman, supra,* at 516). Here, the witness, Roy Garner, was called to the stand and asserted his Fifth Amendment privilege as required by *Carman*, and the Court of Appeals then attempted to justify its decision on the basis that the defendant did not first request the government to grant immunity.

> " . . . Just as an accused has the right to confront the prosecution witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process."
>
> *Washington v. Texas, supra,* 388 U.S. at 19.

> " . . . To insure that justice is done, it is imperative to the function of the *court* that compulsory process be available for the production of evidence needed either by the prosecution or by the defense . . . . " (Emphasis supplied.)
>
> *United States v. Nixon, supra,* 418 U.S. at 709.

Where prosecution conduct causes a witness to assert the Fifth Amendment privilege, immunity must be granted to that witness to enable him to testify for the defense. See *United States v. Morrison, supra,* 535 F.2d at 229; *Webb v. Texas* (1972), 409 U.S. 95.

The argument is here presented that the statute (18 U.S.C. § 6003) as applied denies the petitioner due process.

> " . . . Arguments could be advanced that in a particular case the government could not use the immunity statute for its advantage unless Congress made the same mechanism available for the accused."
>
> *Earl v. United States, supra,* 361 F.2d at 534, n. 1.

The California courts have already reached the conclusion urged by petitioner, recognizing that the failure of the prosecution to immunize witnesses sought to be called by the defense denied the defendant due process, and that the refusal of the prosecution or the court to grant immunity to a defense witness can deprive the

accused of his right to present a defense. *People v. Frohener* (1976), 65 Cal. App. 3d 94; *People v. Sipress* (1975), 51 Cal. App. 3d 98; *Jones v. Superior Court* (1971), 4 Cal. 3d 660, 666. The commentators are in accord: Westen, *The Compulsory Process Clause,* 73 Mich. L. Rev. 71, 166-70 (1974); Comment, *Right Of The Criminal Defendant To The Compelled Testimony Of Witnesses,* 67 Colum. L. Rev. 953, 956, n. 19 (1967); Note, *The Sixth Amendment Right To Have Use Immunity Granted To Defense Witnesses,* 91 Harv. L. Rev. 1266 (1978).

II

A. A Notice Of Appeal Having Been Timely Filed, The Trial Court Was Without Jurisdiction To Proceed.

B. The Denial Of The Motion To Dismiss For Grand Jury Irregularities Was A "Final Order" Within The Purview Of 28 U.S.C. § 1291.

In 1980, in the companion case of *United States v. Roy Garner* (C.A. 9, 1980), 632 F.2d 758, *cert. denied* (1981), ... U.S. ..... , 101 S. Ct. 1373, it was held that a pretrial order denying a motion to dismiss an indictment because of grand jury irregularities was not appealable. In 1981, the same circuit, in *United States v. Wilson,* 639 F.2d 500, held that denial of a motion to dismiss an indictment based upon the ground of "selective prosecution" was properly appealable prior to trial. See also *United States v. Griffin* (C.A. 9, 1980), 617 F.2d 1342 [denial of a motion to dismiss an indictment based on the ground

of "vindictive prosecution" was a "final judgment" and properly appealable before trial.]

In 1977, the Ninth Circuit, in *Moroyoqui v. United States*, 570 F.2d 862, *cert. denied* (1978), 435 U.S. 997, 98 S. Ct. 1651, held that the filing of a Notice of Appeal from an order denying a motion to dismiss on double jeopardy grounds was a final decision, appealable under 28 U.S.C. § 1291, and that:

> "When petitioner 'lodged' his appeal from the trial court's denial of his claim, jurisdiction was conferred upon the Court of Appeals. As a consequence the trial court was without power to proceed with the trial."
>
> *Moroyoqui v. United States, supra,*
> 570 F.2d at 864.

The ruling of the Court of Appeals in the instant case was that where there is a "deficiency" in the Notice of Appeal, "for whatever reason," the District Court is not deprived of jurisdiction, basing its decision on the *Moroyoqui* case and its previous holding in *Ruby v. Secretary of United States Navy* (9th Cir. 1966) (*En Banc*), 365 F.2d 385, *cert. denied,* 386 U.S. 1011, 87 S. Ct. 1358. However, the *Ruby* case held only that if the appeal was defective in "form" or "execution," a Notice of Appeal did not transfer jurisdiction to the Court of Appeals. It also held that it was the duty of the *appellee* to "obtain . . . dismissal of the appeal in the Court of Appeals."

This Court had ruled in *Abney v. United States* (1977), 431 U.S. 651, 97 S. Ct. 2034, that denial of this type of pre-trial motion going to the jurisdiction of the trial court was an immediately appealable "final judgment." *Cohen v. Bene-*

ficial Industrial Loan Corp. (1949), 337 U.S. 541, 69 S. Ct. 639, set forth three requirements which had to be met in order to fall within the "collateral-order" exception to the rule that only final decisions may be appealed:

> "First, there [has] to be a complete and final determination of the issue in the District Court. No appeal may be taken if the matter was left 'open, unfinished or inconclusive.' Second, the decision could not be simply a 'step towards final disposition of the merits of the case [that would] be merged in a final judgment'; rather, it must resolve an issue wholly collateral to the actual cause of action asserted. *Ibid.* Finally, the rights involved in the decision would be 'lost, probably irreparably,' if appellate review was postponed until final judgment. *Ibid.*"
>
> *Cohen v. Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546.

Here, a challenge to the jurisdiction of the trial court was made *prior* to the commencement of trial and *after* the Notice of Appeal had been filed. Immediate jurisdiction had been conferred on the Court of Appeals from the filing of the Notice of Appeal (see *United States v. Stanley* (C.A. D.C. 1972), 469 F.2d 576, 583), and the District Court was without jurisdiction to try petitioner or to enter any judgment of conviction while the matter was on appeal.

C. Petitioner Was Denied Due Process Of Law When She Was Not Permitted Access To Grand Jury Records, Nor Allowed To Present Evidence In Support Of Her Challenge To The Indictment Process, By Reason Of

Grand Jury Irregularities.

In the proceedings brought challenging the indictment for grand jury irregularities, petitioner contended that a sufficient number of grand jurors had not heard the evidence upon which the indictment had been brought, and she requested production of the records of the number of jurors concurring in the finding of the indictment–required to be kept pursuant to Rule 6(c) of Federal Rules of Criminal Procedure.

The District Court made an order requiring the disclosure of dates on which the grand jury considered the case. The records which were produced by the government showed that at least two different grand juries subpoenaed witnesses in conjunction with the case, on several dates between January of 1975 and April 26, 1979 (the date the indictment was returned). Also produced was a transcript of the April 26, 1979 grand jury proceeding, and internal evidence from that transcript indicated that the new grand jurors had been supplied transcripts of prior proceedings but had not examined the contents of these transcripts. Thus, a prima facie showing was made that a majority of grand jurors voting to return the indictment did not hear any evidence in support of the indictment.

What was *not* made available, and which the trial court declined to order, was the requested "record of the number of jurors concurring in the finding of . . . [the] . . . indictment."

It is submitted that the Court of Appeals in the instant case could not have reached any informed decision as to whether a sufficient number of jurors had competent evidence presented to them upon which they could base their

decision to indict. Only the production of the requested records could have revealed that information. This information was also not used by the trial court in denying the motion, and a constitutionally impermissible hiatus exists between the implied findings or conclusions of the trial and appellate courts and the factual basis upon which these conclusions are based.

Rule 6(c) of the Federal Rules of Criminal Procedure requires the foreman of the federal grand jury to "keep a record of the number of jurors concurring in the finding of every indictment and file the record with the clerk of the court." These records are available for inspection on order of the District Court. See *Gaither v. United States* (D.C. Cir. 1969), 413 F.2d 1061, 1065. Upon showing of a "particularized need", *Dennis v. United States* (1966), 384 U.S. 855, the defendant should be afforded access to grand jury attendance and voting records.

Under the rationale of *Dennis*, the defendant should have been accorded the right to inspect the required record or, if such record was not properly maintained as required by the rule, to have access to some method of substituted proof to ascertain that the substantive provisions of Federal Rule of Criminal Procedure 6(f) were met. *United States v. Bullock* (C.A. 5, 1971), 448 F.2d 728, 729.

Although the proceedings before the grand jury are secret, the ground rules by which the grand jury conducts those proceedings are not. *United States v. Alter* (C.A. 9, 1971), 482 F.2d 1016, 1029, n. 21.

If a requisite number of grand jurors did not hear any evidence, then there was failure of compliance with the Fifth Amendment mandate that a federal prosecution of this nature

be brought by a grand jury indictment or presentment. It is as if no indictment had been brought. This Court has characterized the various constitutional provisions, such as the double jeopardy clause and the speech and debate clause, as designed to protect persons "not only from consequences of litigation results but also from the burden of defending themselves." *Helstoski v. Meanor* (1979), 442 U.S. 500, 508.

There is no perceivable difference from bringing an indictment in violation of the "double jeopardy" clause (*Abney v. United States, supra,* 431 U.S. 651), the "speech and debate" clause, or the "indictment" clause. The petitioner, at the threshold, was denied access to relevant information which might have shown that the indictment was illegally brought and that the trial should never have proceeded.

III
A., B., and C.

The Evidence Was Insufficient To Sustain The Conviction Of The Petitioner And Petitioner Was Denied Due Process Of Law Both At Trial And On Appeal (Where The Appellate Court Used An Inappropriate Standard Of Review).

This Court, in *Jackson v. Virginia* (1979), 443 U.S. 307, 61 L. Ed. 2d 560, held that in a habeas corpus proceeding arising out of a claim that a person had been convicted in the state court upon insufficient evidence, a federal court had the duty to inquire whether there was

sufficient evidence to justify a rational trier of facts to find guilt beyond a reasonable doubt, basing its premise on the due process clause of the United States Constitution. It is unclear from the opinion whether this standard was used or whether the standard set forth in *Hamling v. United States* (1974), 418 U.S. 87, 124, 94 S. Ct. 2887, 2911, was used; *i.e.*, "A jury verdict must be sustained on appeal if there is substantial evidence to support it."

In order to sustain a conviction in a "wire fraud" prosecution, the government must prove a scheme to defraud and a telephone call made "for the purpose of executing the . . . scheme." *United States v. Corey* (C.A. 2, 1977), 566 F.2d 429, 430, n. 2. Proof of the content of the telephone call alleged in the indictment is "crucial" to the government's case. *United States v. Polizzi* (C.A. 9, 1974), 500 F.2d 856, and see *Osborne v. United States* (C.A. 9, 1967), 371 F.2d 913. 927.

The Court of Appeals confirmed petitioner's conviction based upon the purported testimony of Dennis that Roy had called him in December and asked him if he received an invitation to play at Harrah's Club, and when Dennis said he had, Roy had replied, "We're going to play." The Court of Appeals' opinion thereafter goes on to state:

> "That telephone call from the Garner telephone in Reno, Nevada, to Dennis in Oxnard, California, was shortly thereafter followed by Dennis's travel to Reno, where Dennis rehearsed the card cheating scheme with Rowena and her husband."
>
> (Appendix p. 8, opinion of the Court of Appeals.)

And: "In the instant case, although the December phone call was not an essential part of the scheme, there

> was ample evidence to support the jury's conclusion that Roy made the call for the purpose of finding out if and when Dennis would be coming to Reno in order to execute the gambling scheme. That is sufficient for purposes of section 1343."
>
> (Appendix p. 9, opinion of the Court of Appeals.)

The telephone call in question was between Roy Garner and Sherman Dennis. The government's case was based in substantial part on the testimony of Dennis (Garner was unavailable to testify [see *infra*]). According to Dennis, the government's witness, he and Garner *never* discussed their "play" over the telephone. While Dennis did recall the December conversation, he was not certain that the conversation took place over the telephone and thought that it *probably* took place in California when Garner was visiting. According to Dennis: "The probability [was] that [Garner] was in Ojai at the time" (*i.e.*, at the time of the conversation relied upon by the Court of Appeals to sustain Rowena Garner's conviction). Given that the *only* evidence presented by the government was that the conversation in question probably did *not* involve the use of wire communications, the opinion's statement that "there was ample evidence to support the jury's conclusion that Roy made the call for the purpose of finding out when Dennis would be coming to Reno" (*supra*) is clearly unsupported by the evidence. Not only did the government fail to prove the content of the call, it failed to prove that any call was made in furtherance of the scheme to defraud. Even if the conversation *had* taken place on the telephone, it would have been no more than peripheral to any scheme to defraud. It is clear that no telephone call was made for the purpose of engag-

ing in that conversation; that the conversation probably took place in person in California; and that the conversation was no more than a passing question and answer in the context of a discussion between Dennis and Garner. There was no call for the *purpose* of executing a scheme to defraud and, therefore, no showing of wire fraud. *United States v. Holmes* (W.D. Mo., 1975), 398 F. Supp. 1077, 1080.

In sustaining Rowena Garner's interstate travel conviction on an aiding and abetting theory, the Court of Appeals quoted Learned Hand's famous dictum that an aider and abettor must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed" (appendix p. 9, opinion of the Court of Appeals).

The Court of Appeals then went on, relying on *United States v. Ryan* (9th Cir. 1976), 548 F.2d 782, 786, to state that an interstate connection with respect to each defendant's activity is not required; rather, "the government need only show that the scheme as a whole had substantial interstate connections" (appendix p. 10, opinion of the Court of Appeals).

The instant case, unlike *Ryan*, involves no conspiracy charge. Thus, there can be no vicarious liability or responsibility attributed to co-conspirators for the acts of others. For example:

> "[While] [i]t may aid the financial success of an illegal gambling enterprise for a managing partner to steal the purse of a patron, to bribe a police officer, or to falsify the tax reports of the partnership; . . . we do not believe that all co-partners could be prosecuted for such crimes if they had no knowledge of them, and had not conspired to

> bring them about, even though their commission may have served, but was no part of, the objectives of or the motivation for the admittedly illegal partnership enterprise."
>
> *United States v. Barnes* (6th Cir. 1967), 383 F.2d 287, 292.

While Sherman Dennis's interstate travel may have violated 18 U.S.C. § 1952, Rowena Garner's sole involvement with Dennis was to have practice sessions at her home in Reno, Nevada.

In sum, the Court of Appeals either misconstrued or misstated the government's case against petitioner, and also failed to apply established law both in the same and other circuits, *United States v. Polizzi, supra,* 500 F.2d 856; *Osborne v. United States, supra,* 371 F.2d 913; *United States v. Roselli* (C.A. 9, 1970), 432 F.2d 879; *United States v. Corey, supra,* 566 F.2d 429; *United States v. Auler* (C.A. 7, 1976), 539 F.2d 642, 648, ignoring the question posed by this Court in *United States v. Mays* (1974), 414 U.S. 395; *i.e.:* Was the use of the wires *by the defendant* "for the purpose of executing" the fraudulent scheme or was that use "but remotely and insignificantly connected with that scheme"?

Similarly, in the interstate travel section, the court ignored the established law that in the absence of a conspiracy charge proof of agreement alone is not enough, and that the government must show that the defendant assisted the perpetrator. See *Nye and Nissen v. United States* (1949), 336 U.S. 613, 619-620. Rowena Garner was not alleged to have *conspired* with Sherman Dennis but was alleged to have aided and abetted . . . to have "caused" . . . his interstate travel. It is clear that they never played cards at

Harrah's together and that they never even played on the same date. Whether or not they each engaged in the same gambling offense in violation of Nevada law is academic, for they did not do it together and Rowena Garner's offense was one of merely a local concern. The confusion arose in the instant case because the government showed *two* separate schemes: one involved Dennis and Roy Garner and included travel by Dennis in interstate commerce, but the other–the scheme involving Rowena and Roy–involved no interstate travel or telephonic communications. In other words, there had to be some evidence that the alleged aider and abettor, Rowena Garner, "shared in the criminal intent of the principal." *United States v. Eddy* (C.A. 5, 1979), 597 F.2d 430; *United States v. Smith* (C.A. 5, 1977), 546 F.2d 1275. Aiding and abetting under § 2 simply does not involve the vicarious liability associated with conspiracy. *United States v. Barnes, supra,* 383 F.2d at 292.

IV

Petitioner Was Denied A Fair Trial And Due Process Of Law Where The Trial Court Stressed To The Jury That It Should Consider The Cost Of Litigation And The Concomitant Importance Of The Jury's Reaching A Verdict.

Approximately one hour after the court stressed to the jury the importance of its reaching a verdict because of the expense of litigation to all sides, the jury returned a verdict of "guilty." Involved here is a request for the Court to review not only the viability but the limits of permissible

coercive instructions sanctioned in *Allen v. United States* (1896), 164 U.S. 942, 17 S. Ct. 154.

The *Allen* charge itself has been described as the limit to which a trial court may venture in instructing a jury. *United States v. Seawell* (9th Cir. 1977), 550 F.2d 1159, 1161; *United States v. Scott* (6th Cir. 1977), 547 F.2d 334, 337. The *Allen* charge, of course, has been criticized by many commentators and has been abandoned by several courts. 2 C. Wright, *Federal Practice and Procedure*, Section 502 at 356-60 (1969); *People v. Gainer* (1977), 19 Cal. 3d 835; *Commonwealth v. Spencer* (1971), 442 Pa. 328, 275 A.2d 299.

Here, the trial court instructed the jury that it should consider the time and expense involved in the case, but it failed to instruct the jurors not to surrender their honest views as to the guilt or innocence of the defendant.

When the *Allen* charge is given, it *must* include an admonition to the jurors not to surrender their honest views. In *United States v. Seawell*, for example, the jury was instructed:

> "Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight and effect of the evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and conscience. Remember too, if the evidence in the case fails to establish a guilt beyond a reasonable doubt, the accused should have your unanimous verdict of not guilty."

United States v. Seawell, Supra, 550 F.2d at 1161, n. 2; see also *United States v. Scott, supra,* 547 F.2d at 338.

Here, because the trial court failed to admonish the jurors not to surrender their honestly held beliefs, and because it failed to remind the jurors of the reasonable doubt standard at the time of its supplemental instruction, petitioner's convictions should be reversed. Whatever the viability of the *Allen* charge, it is clear that the charge is the limit beyond which a federal district judge may not venture. In its present state, the *Allen* charge includes an admonition to the jurors not to surrender their honestly held beliefs and a reminder that nothing in that charge in any way displaces the government's burden of proof beyond a reasonable doubt. The charge given below did neither.

In addition, the charge impressed upon the jury the importance that the case be *decided.* That practice, too, has been the subject of criticism, for it tends to limit a defendant's right to a hung jury. Telling a jury that "[i]t is important that [this lawsuit] be *disposed of*" is preferred to an instruction that the case must be "*decided.*" *United States v. Giacalone* (6th Cir. 1978), 558 F.2d 1158, 1167, n. 10; *United States v. Harris* (6th Cir. 1968), 391 F.2d 348, 356-357. An instruction that a case must or should be decided might well eliminate the possibility of a hung jury and mistrial, which has been described by Judge Wright as "as much a part of the jury system as a unanimous verdict." *Williams v. United States* (D.C. Cir. 1964), 338 F.2d 530, 533. As Judge Brown of the

Fifth Circuit stated:

> "I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming temporary public sentiment. Nothing should interfere with its exercies. In the final analysis the *Allen* charge itself does not make sense. All it may rightfully say is that there is a duty to consider the view of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superflous lecture on citizenship. If it says more to declare that there is a duty to *decide*, it is legally incorrect as an interference with that rightful independence.
>
> "The time has come, I think, to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great."
>
> *Huffman v. United States* (5th Cir. 1962), 297 F.2d 754, 759 (Brown, J., dissenting). (Emphasis added.)

CONCLUSION

For the reasons above stated, this Court should grant certiorari to resolve the important issues raised.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner

Appendix

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROWENA OWEN GARNER, Defendant-Appellant.

Nos. 79-1805.
80-1147.

Argued April 14, 1981
Submitted April 24, 1981
Decided September 14, 1981

Appeal from the United States District Court for the District of Nevada.

Before WALLACE and SCHROEDER, Circuit Judges, and CRAIG*, District Judge.

WALLACE, Circuit Judge:

Rowena Garner (Rowena) appeals from a judgment of conviction by jury verdict on one count of wire fraud, 18 U.S.C. § 1343, and aiding and abetting wire fraud, 18 U.S.C. § 2, and one count each of interstate travel and transportation of money in furtherance of an unlawful activity, 18 U.S.C. §§ 1952 & 2314, and aiding and abetting the same. The following issues are raised in this appeal: (1) whether

*Honorable Walter E. Craig, United States District Judge, District of Arizona, sitting by designation.

the trial court was without jurisdiction to proceed to trial after Rowena filed a pretrial notice of appeal;[1] (2) whether the wire fraud conviction must be reversed because the government failed to prove a telephone call in furtherance of the scheme to defraud; (3) whether there was sufficient evidence to sustain Rowena's convictions for aiding and abetting wire fraud and interstate travel; (4) whether the failure of the district court to grant immunity to Roy Garner (Roy) deprived Rowena of due process; and (5) whether the district judge's denial of Rowena's motion to dismiss the indictment for grand jury irregularities and his refusal to order inspection of grand jury records was error. We affirm.

I

Rowena was involved with Roy, her husband, and with Dennis and Curry, in a scheme to cheat at blackjack at Harrah's Casino in Lake Tahoe, Nevada. The cheating took place on September 30, December 27, and December 28, 1974. The Garners and Dennis practiced playing blackjack at Dennis's home in Oxnard, California, and at the Garners' home in Reno. Prior to the September 30 session, they practiced for approximately one and one-half hours. Rowena dealt, while Dennis played the two middle hands and Roy played the third hand. During the practice, Roy would signal to Dennis. He would raise his card or stroke the side of his head to indicate to Dennis the appropriate play. They practiced again at the Garner home before

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[1] Even though neither party raised this issue on appeal, we requested supplemental briefing because the issue presented a jurisdictional question.

Dennis's December sessions with the Garners.

Roy had also involved Curry, the casino manager at Harrah's. Roy would give Curry decks of marked cards to put into play at the tables where he was playing.

Roy played with Dennis at Harrah's on September 30 and December 28, 1974. Rowena did not play on either occasion. In November and December of 1974, Roy played at Harrah's with a person referred to as "Wilma Rogers." Dennis identified Rowena as Wilma Rogers, even though both Curry and the dealer who dealt blackjack to Wilma Rogers in November, 1974 were unable positively to identify Rowena as Wilma.

Rowena's conviction for wire fraud and interstate travel was based on alleged telephone conversations between Roy and Dennis in December of 1974, and upon Dennis's travel from California to Nevada to play blackjack.

II

The first issue that we must address in this appeal is whether the district court had jurisdiction to proceed with the trial of Rowena after her pretrial notice of appeal had been filed. Rowena filed a motion to dismiss the indictment for grand jury irregularities. The motion was denied and Rowena filed a timely notice of appeal on the day the trial commenced.[2]

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[2]The following conversation took place between the district judge, Rowena's attorney, Marks, and the government's attorney, Coon, immediately prior to the opening statements:

> THE COURT: We will now bring in the jury, Mr. Bailiff.
> MR. MARKS: Well, your Honor, might I address the Court?
> THE COURT: No, I want the jury brought in at this time. All motions that have been pending are disposed of. We will now proceed.

We have recently held that a pretrial order denying a motion to dismiss an indictment because of grand jury irregularities is not appealable. *United States v. Garner*, 632 F.2d 758, 766 (9th Cir. 1980), *cert. denied*, ... U.S. ..... , 101 S. Ct. 1373, 67 L. Ed. 2d 351 (1981). At the time the district judge proceeded with the trial, however, it was unclear whether a pretrial appeal could be taken from such an order. The question is whether the district court has power to proceed until the appeal is acted upon by the court of appeals.

In *Moroyoqui v. United States*, 570 F.2d 862 (9th Cir. 1977), *cert. denied*, 435 U.S. 997, 98 S. Ct. 1651, 56 L. Ed. 2d 86 (1978), the defendant "lodged" an appeal following a denial of his motion to dismiss on double jeopardy grounds. Apparently because of the pendency of *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), the defendant decided that the appeal would be lodged, but that no attempt would be made to pursue it further at that time. During the appeal from his conviction, the Supreme Court held in *Abney* that an order

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2 (cont'd)

MR. MARKS: Well, your Honor, I respectfully submit—
MR. COON: I have a motion that was left on my desk, your Honor.
MR. MARKS: Not a motion, a notice of —
THE COURT: We are going to go ahead with this matter. Some sort of notice of appeal has been sent to my office and they are studying it, but we are going to proceed with the trial at this time. Please bring in the jury. As soon as we can we will try to dispose of that matter, such questions as may be raised by the notice filed.
MR. MARKS: Your Honor, I submit the Court is without jurisdiction to proceed any further with that.
THE COURT: All right, we'll deal with that.

denying a motion to dismiss on double jeopardy grounds was a final decision and therefore appealable under 28 U.S.C. § 1291. Based upon *Abney*, we set aside the defendant's conviction and held that: "when petitioner 'lodged' his appeal from the trial court's denial of his claim, jurisdiction was conferred upon the court of appeals. As a consequence the trial court was without power to proceed with the trial." *Moroyoqui v. United States, supra*, 570 F.2d at 864.

In another line of cases, however, we have held that the district court does retain some jurisdiction after a notice of appeal has been filed. In *Ruby v. Secretary of United States Navy*, 365 F.2d 385 (9th Cir. 1966) (en banc), *cert. denied* , 386 U.S. 1011, 87 S. Ct. 1358, 18 L. Ed. 2d 442 (1967), we held that if a notice of appeal is invalid, the district court retains jurisdiction and may ignore it. In *Ruby*, a motion to dismiss a complaint was granted on June 17. A notice of appeal from the order was filed on July 14. The judgment dismissing the action was entered on August 3. No further notice of appeal was filed. We held that the premature notice of appeal did not deprive the trial court of jurisdiction to enter the judgment. *Id.* at 389. Although the notice was ineffective to affect the trial court's jurisdiction, it did become effective when the appealable judgment was finally entered. We stated that:

> The only thing that is accomplished by a proper notice of appeal is to transfer jurisdiction of a case from a district court to a court of appeals. If, by reason of defects in form or execution, a notice of appeal does

> not transfer jurisdiction to the court of appeals, then such jurisdiction must remain in the district court; it cannot float in the air.
>
> *Where the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a nonappealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction.* If the district court is in doubt as to whether the notice of appeal is inoperative by reason of some such defect, it may decline to act further until the purported appellee obtains dismissal of the appeal in the court of appeals. In the rare instance where the district court proceeds with a case under the mistaken belief that notice of appeal is inoperative, the appellant may apply to the court of appeals for a writ of prohibition.

Id. at 388 - 89 (emphasis added). We have followed the reasoning of *Ruby* in subsequent cases. *United States v. Burt*, 619 F.2d 831, 835 - 36 (9th Cir. 1980); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098, 1101 (9th Cir. 1971).

We interpret *Moroyoqui* as consistent with *Ruby* by reading *Moroyoqui* as holding that once a petitioner has filed an appeal of an order that is appealable, such as the claim based upon double jeopardy in *Moroyoqui*, jurisdiction is conferred immediately upon the court of appeals. When there is a deficiency in the notice of appeal for whatever reason, however, the district court is not deprived of jurisdiction. Here there was such a deficiency because the order denying Rowena's motion to dismiss the

indictment due to grand jury irregularities was non-appealable. *United States v. Garner, supra,* 632 F.2d at 766. Thus, the trial court maintained jurisdiction to proceed with the trial.

III

Rowena first challenges the sufficiency of the evidence. A jury verdict must be sustained on appeal if there is substantial evidence to support it. *Hamling v. United States,* 418 U.S. 87, 124, 94 S. Ct. 2887, 2911, 41 L. Ed. 2d 590 (1974). We respect the exclusive province of the jury to determine the credibility of the witnesses and to resolve evidentiary conflicts. We must determine: "whether the evidence, considered most favorably to the government, was such as to permit a rational conclusion by the jury that the accused was guilty beyond a reasonable doubt." *United States v. Ramos,* 558 F.2d 545, 547 (9th Cir. 1977), *quoting United States v. Nelson,* 419 F.2d 1237, 1242 (9th Cir. 1969).

A.

Rowena argues that her wire fraud conviction must be reversed because the government failed to prove a telephone call in furtherance of the scheme to defraud as required by 18 U.S.C. § 1343. The government has the burden of proving the contents of the telephone conversation made in furtherance of the unlawful activity. *Osborne v. United States,* 371 F.2d 913, 927 (9th Cir.), *cert. denied,* 387 U.S. 946, 87 S. Ct. 2082, 18 L. Ed. 2d 1335 (1967). However, circumstantial evidence is not inherently less probative than is direct evidence. *United States v. Green,* 554 F.2d 372,

375 (9th Cir. 1977).

The government attempted to meet its burden by producing records of numerous calls between the Garners' telephone and Dennis's telephone. In addition, Dennis testified that Roy called him in December and asked him if he received an invitation to play at Harrah's Club. When Dennis said he had, Roy replied, "We're going to play." That telephone call from the Garner telephone in Reno, Nevada, to Dennis in Oxnard, California, was shortly thereafter followed by Dennis's travel to Reno, where Dennis rehearsed the card cheating scheme with Rowena and her husband.

We find that the government has successfully met its burden. 18 U.S.C. § 1343 requires that the telephone call be made "for the purpose" of committing the unlawful activity. We are guided by the Supreme Court's interpretation of the mail fraud statute in our interpretation of the similar provision in the wire fraud statute. *United States v. Wolfson*, 634 F.2d 1217, 1220 (9th Cir. 1980). In *United States v. Maze*, 414 U.S. 395, 94 S. Ct. 645, 38 L. Ed. 2d 603 (1974), the Court held that the government may prove the use of the mails for the purpose of executing a scheme to defraud by showing that a defendant acted knowing that the use of the mails would follow in the ordinary course of business, or that, even when not intended, such use was reasonably foreseeable. *Id.* at 399, 94 S. Ct. at 648. In addition, the mailings need not be an essential part of the contemplated scheme, they need only be made for the purpose of executing the scheme. *Id.* at 400, 94 S. Ct. at 648; *United States v. Bohonus*, 628 F.2d 1167, 1173 (9th Cir.), *cert. denied*, 447 U.S. 928, 100 S.Ct.

3026, 65 L. Ed. 2d 1122 (1980). In the instant case, although the December phone call was not an essential part of the scheme, there was ample evidence to support the jury's conclusion that Roy made the call for the purpose of finding out if and when Dennis would be coming to Reno in order to execute the gambling scheme. That is sufficient for purposes of section 1343.

B.

Next, Rowena argues that the evidence presented was insufficient to sustain her conviction for aiding and abetting wire fraud and interstate travel. She argues that the government showed two separate schemes: one involving Dennis and Roy, and one involving Rowena and Roy. She argues that the second scheme involved no interstate travel or telephone communication. Further, she argues that the only involvement shown between Dennis and herself, other than the fact that both of them played cards on different dates at Harrah's with Roy, is the evidence of the blackjack practice sessions.

We find the evidence of those practice sessions sufficient to sustain her conviction. We have held that aiding and abetting as used in 18 U.S.C. § 2 means to assist the perpetrators of a crime. *United States v. Lane*, 514 F.2d 22, 26 (9th Cir. 1975). In *Lane* we stated that:

> . . . In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." L. Hand, J., in *United States v. Peoni*,

2 Cir., 100 F.2d 401, 402.
United States v. Lane, supra, 514 F.2d at 26, *quoting Nye & Nissen v. United States,* 336 U.S. 613, 619, 69 S. Ct. 766, 769, 93 L. Ed. 919 (1949). There is sufficient evidence that Rowena participated extensively in the blackjack practice sessions. In particular, Dennis testified that at the December practice session, Rowena criticized Dennis for failing to follow Roy's signals properly.

Moreover, the government is not required to establish an interstate connection with respect to each defendant's activity. Rather, the government need only show that the scheme as a whole had substantial interstate connections. *United States v. Ryan,* 548 F.2d 782, 786 (9th Cir. 1976), *cert. denied,* 430 U.S. 965, 97 S. Ct. 1644, 52 L. Ed. 2d 356 (1977). We find that the scheme as a whole had sufficient interstate connections to convict Rowena.

IV

Rowena argues that the district court's failure to grant immunity to Roy deprived her of due process, of the subpoena power of the court to present evidence on her behalf, and of her right to counsel. She argues that where the prosecution relies upon the testimony of immunized witnesses to establish its case, due process requires that immunity be afforded to defense witnesses in similar circumstances to those witnesses already given immunity. In support of her position, she relies upon a footnote in *Earl v. United States,* 361 F.2d 531, 534 n. 1 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921, 87 S. Ct.

2121, 18 L. Ed. 2d 1370 (1967). We have defined the question, however, as whether the defendant "was denied a fair trial because of the government's refusal to seek immunity for defense witnesses." *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948, 96 S. Ct. 3167, 49 L. Ed. 2d 1184 (1976). In *Alessio*, we held that the government's refusal to grant immunity where it had immunized its own witnesses did not deny the defendant a fair trial because the testimony had already been presented to the jury through other witnesses. Thus, because the defendant was unable to demonstrate any prejudice resulting from the government's refusal to grant immunity, there was no denial of due process. *Id.*

In *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978), we followed *Alessio* and found that the defendant must demonstrate that evidence favorable to him was actually suppressed. *Id.* at 561. No such evidence was presented by Rowena in the instant case. There is nothing in the record to indicate that Roy would have given testimony favorable to her. The record is also silent as to whether, if given immunity, Roy would have relied upon his spousal privilege and refused to testify anyway. *See Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980).

In addition, we agree with the government that Rowena failed to follow the proper procedure. There is nothing in the record to indicate that she or her counsel ever requested immunity directly from the government. Instead, she made a motion in open court for use immunity, after Roy had asserted his Fifth Amendment privilege

on the witness stand. The motion was denied by the trial court, with no position taken by the government. 18 U.S.C. § 6003, dealing with immunity in court and grand jury proceedings, has no provision for any party except the government to be the moving party for an immunity grant.[3] Thus, the proper procedure is for the defendant first to ask the government for immunity of a defense witness, and if the government refuses, then the defendant may petition the court for a grant of immunity.

V

Rowena argues that the district court erred in failing to dismiss the indictment for grand jury irregularities. She argues that the district judge erroneously denied her motion to inspect grand jury records showing the attendance of jurors concurring in the finding of the indictment. She states that such disclosure was necessary because a quorum of the grand jurors voting to return the indictment had not directly heard the evidence to support the indictment.

The district judge did not abuse his discretion in denying Rowena's motion. When a duly constituted grand jury returns an indictment valid on its face, we have found

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[3] 18 U.S.C. § 6003(b) provides in part:

> A United States Attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—
> (1) the testimony or other information from such individual may be necessary to the public interest; and
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

that no independent inquiry may be made to determine the kind of evidence considered by the grand jury in making its decision. *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). Here, the trial court ordered full disclosure of all testimony given before the grand jury. The record establishes that the grand jurors who voted for the indictment had before them a complete transcript of all testimony taken by the previous grand jurors regarding the matter. They also heard testimony summarizing the transcripts. We do not require that the prosecutor present live witnesses to the grand jury; it is sufficient if the prosecutor presents complete transcripts of the sworn testimony. *See United States v. Chanen*, 549 F.2d 1306, 1311 (9th Cir.), *cert. denied*, 434 U.S. 825, 98 S. Ct. 72, 54 L. Ed. 2d 83 (1977). Further, the mere possibility that an absent juror might not hear any evidence on one of the counts is not a sufficient basis for attacking the indictment. *United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645, 648 (9th Cir. 1980), *cert. denied*, ... U.S. ..... , 101 S. Ct. 3110, 69 L. Ed. 2d ..... (1981). An indictment is valid if: "(1) the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict." 637 F.2d at 649. Because Rowena has failed to allege that any of these requirements were not met, the district court acted properly in refusing to dismiss the indictment.

VI

Finally, Rowena argues that the district court's charge to the jury regarding the time and expense

involved in the trial was improper. After the jury had deliberated for several hours, the district judge called the jurors back into the courtroom for purposes of ascertaining their ability to continue with deliberations. The jurors were instructed that they should "realize the expense of trial to everyone involved . . . . " The district judge went on to admonish the jury that it should "retire to the jury room and continue [its] deliberations and endeavor to reach a verdict if [it] can."[4]

Rowena argues that because the district court instructed the jury that it should consider the time and expense involved in the case, but failed to instruct the jurors not to surrender their honest views as to the guilt or innocence of the defendant, that the instruction does not fall within the language sanctioned by the Supreme Court in *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896). We do not read *Allen* as specifically requiring such an admonition to the jury. In fact, the instruction given by the judge in the instant case was very similar to the instruction approved by us in

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[4]The district judge instructed the jury as follows:

> The one thing I do want to stress to the members of the jury, and if I am able to do this, I know you all realize the expense of trial to everyone involved in it, to both sides, to yourselves. I know that all of you realize the importance of the case to the defendant and to the Government, that it is an important case, that it be received . . . .
>
> Well, I know you're fine people and doing the best you can, and I will ask you at this time to retire to the jury room and continue your deliberation and endeavor to reach a verdict if you can, and we'll stand by and see what progress is made.

Walsh v. United States, 371 F.2d 135 (9th Cir.), *cert. denied*, 388 U.S. 915, 87 S. Ct. 2130, 18 L. Ed. 2d 1357 (1967). In *Walsh*, we upheld an instruction in which the district judge told the jurors to keep trying. *Walsh v. United States, supra*, 371 F.2d at 136. In that case, we did not require the district judge to instruct the jurors not to surrender their honestly held beliefs. Moreover, we do not find any evidence in the record indicating that the instruction affected the jury's verdict in any way. *See United States v. Beattie*, 613 F.2d 762, 764 (9th Cir.), *cert. denied*, 446 U.S. 982, 100 S. Ct. 2962, 64 L. Ed. 2d 838 (1980).

AFFIRMED.

APPENDIX "B"

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROWENA OWEN GARNER, Defendant-Appellant.

Nos. 79-1805
80-1147
D.C. No. CR-R-79-17, ECR

Filed November 16, 1981

Appeal from the United States District Court for the District of Nevada

Before: WALLACE and SCHROEDER, Circuit Judges, and CRAIG,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Walter E. Craig, United States District Judge, District of Arizona, sitting by designation.

APPENDIX "C"

ORDER GRANTING APPLICATION FOR STAY OF MANDATE

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROWENA OWEN GARNER, Defendant-Appellant.

Nos. 79-1805
80-1147

Filed December 3, 1981

Issuance of the mandate in the above matter is stayed for 30 days from the date this order is filed pending appellant's petition for writ of certiorari.

WALLACE
United States Circuit Judge

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Riverside)

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States and employed in the County of Riverside, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 1340 West Sixth Street, Corona, California 91720, that on DECEMBER , 1981, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (United States v. Garner) on the following named parties by depositing three copies thereof, each enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Corona, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEVADA
300 Las Vegas Boulevard South
Federal Building
Las Vegas, Nevada 89101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on DECEMBER , 1981, at CORONA, CALIFORNIA.

D. A. Standefer

41 copies to U. S. Supreme Court, Washington, D. C. with $200 docket fee annexed to copy marked "Original"

Dean-Standefer, 1340 W. Sixth St., Corona, Calif. 91720
(714) 738-0811

Opposition

Office - Supreme Court, U.S.
FILED
MAR 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1236

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROWENA OWEN GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARSHALL TAMOR GOLDING
Attorney

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Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether a notice of appeal from an unappealable pretrial order divests the trial court of jurisdiction to proceed.

2. Whether petitioner had a due process right to production of the record of the number of grand jurors concurring in the return of the indictment.

3. Whether petitioner was entitled to a grant of use immunity for her husband, an untried co-defendant summoned by her as a defense witness.

4. Whether the evidence was sufficient to sustain the conviction.

5. Whether the court's supplementary remarks coerced the jury to return a guilty verdict.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1236

ROWENA OWEN GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 663 F. 2d 834.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1981. A petition for rehearing was denied on November 16, 1981 (Pet. App. 16). The petition for a writ of certiorari was filed on December 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on one count of wire fraud, in violation of 18 U.S.C. 1343 and 2 (count 1), and one count of causing interstate travel with intent to carry on an illegal activity, in violation of 18 U.S.C. 1952(a)(3) and 2 (count 2). She was sentenced to two

years' imprisonment on count 1, and was given a suspended sentence of three years' imprisonment and placed on four years' probation on count 2. The court of appeals affirmed (Pet. App. 1-15).

The evidence showed that petitioner engaged in a scheme with co-defendants Roy Garner (her husband) and Sherman Dennis to defraud Harrah's Tahoe Hotel-Casino, Inc. by cheating at Twenty-One.[1] The essence of the scheme was that Roy Garner would play in the last position next to the dealer, betting small sums, while either Dennis or petitioner—disguised as an older woman and calling herself "Wilma Rogers" (II Tr. 54-57; III Tr. 50-58; VI Tr. 21, 77)[2]—would play in the middle position, betting large sums (VI Tr. 32-33, 40). Roy Garner would signal to the other player indicating whether he should draw cards or stand pat, and would play his cards not to win his own hand but to maximize the chances of the dealer going over 21 (Pet. App. 2-3; VI Tr. 68). Before the two sessions (September 30 and December 28, 1974) when Dennis played the middle position, practice sessions with marked cards were held at the Garner residence. Petitioner dealt, Roy Garner played the end position and Dennis the middle position; Roy Garner and petitioner critiqued Dennis's ability to follow Roy's signals (Pet. App. 2-3; II Tr. 46-53). Before sessions on December 27 (with "Wilma Rogers") and December 28 (with Dennis), Roy Garner gave to Joseph Curry, Harrah's casino manager to whom he had made payments (VI Tr. 22, 26), decks of cards which appeared to be genuine Harrah's cards. Garner requested that Curry put them into the game to "make the

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[1]Dennis testified as a government witness after receiving a grant of immunity. Roy Garner pleaded guilty to two counts of the indictment after petitioner's trial.

[2]"Tr." refers to the trial transcript, numbered by volume. "Ex. R." refers to the "Excerpt of Record" filed by petitioner in the court of appeals.

playing better" (VI Tr. 35, 71-72). Curry assumed that the cards were marked since there would be no other purpose for their being given to him (VI Tr. 69).

The wire fraud count was based on an interstate telephone conversation between Roy Garner and Dennis in December, 1974 in which Garner inquired whether Dennis intended to accept Harrah's invitation to come to the casino to play during Christmas week (II Tr. 139-141). The interstate travel count was based on Dennis's travel from Califorina to Nevada to participate in the December 28 game.

ARGUMENT

1. The evidence against petitioner, her husband and Dennis was presented to an earlier grand jury, which did not return an indictment. Transcripts of the evidence before that grand jury were presented to the indicting grand jury, and the transcripts were summarized to the grand jurors by the agent in charge of the case (see Pet. App. 13). Petitioner and Roy Garner moved to dismiss the indictment on the ground that an insufficient number of grand jurors had heard the evidence upon which the indictment was brought; they also moved for production of the record of the number of grand jurors concurring in the return of the indictment (see Pet. App. 15).[3] The district court denied those and other pretrial motions on November 30, 1979. Petitioner's trial began on December 7, 1979. On December 10, 1979, petitioner filed a notice of appeal from the denial of her motion to dismiss on the ground of grand jury irregularity

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[3]In response to the motion for production, the court ordered disclosure of all testimony given before the grand jury (see Pet. App. 13). Petitioner's claim that the grand jurors had not heard the evidence upon which the indictment was brought was apparently based upon questions put by the jurors to the agent after he had summarized the testimony before the prior grand jury. Those questions, in petitioner's view, indicated that the jurors were not familiar with the transcripts of the prior grand jury proceedings. See Ex. R. 24-38.

(Ex. R. 39; see also I Tr. 81). Petitioner asserted that the filing of the notice of appeal deprived the trial court of jurisdiction to proceed further with the case. The court nonetheless ordered the jury to be brought in and trial to proceed (I Tr. 82).

a. Petitioner contends that the trial court was without jurisdiction to proceed with her trial once she filed her notice of appeal. This contention is without merit. As the court of appeals correctly held (Pet. App. 6-7), a defendant does not divest the trial court of jurisdiction by filing a notice of appeal from an unappealable order. See *United States* v. *Hitchmon*, 602 F. 2d 689 (5th Cir. 1979) (en banc), and cases cited. The denial of a motion to dismiss on the ground of asserted grand jury irregularities is not within the "small class of cases" held in *Abney* v. *United States*, 431 U.S. 651, 659 (1977), to be "beyond the confines of the final-judgment rule" because they are "collateral to, and separable from," the "merits of the charge" against the defendant. See *United States* v. *Garner*, 632 F. 2d 758, 766 (9th Cir. 1980), cert. denied, 450 U.S. 923 (1981).

b. Petitioner also argues that she was denied due process because she was not permitted to see the record of the number of grand jurors concurring in the return of the indictment. The claim is without merit. A defendant must show a "particularized need" to obtain access to grand jury records. *Dennis* v. *United States*, 384 U.S. 855 (1966). The information that petitioner sought—the number of grand jurors concurring in the return of the indictment—had no relevance to her assertion that the indictment should be dismissed because the grand jurors had not read the transcript of the prior grand jury proceedings. Moreover, the transcript of the case agent's testimony and of the questions put to him and to the prosecutor by the grand jurors does not support petitioner's assertion that the jurors were unfamiliar with the transcripts of the prior grand jury proceedings (Ex. R. 25-38).

2. Petitioner called her husband, Roy Garner, as a witness and inquired whether he knew Wilma Rogers, and whether he had entered into a scheme to defraud Harrah's. He refused to answer both questions, invoking his privilege against self-incrimination. Petitioner then requested the court to confer use immunity on him and the court refused (VII Tr. 70-71).

The trial court's ruling was unexceptionable. 18 U.S.C. 6003 provides that immunity shall be granted only upon the request of the United States Attorney. A court thus lacks authority to grant immunity on its own motion.[4] It has been suggested in a few Third Circuit cases that under some circumstances a court may extend "judicial immunity" to defense witnesses,[5] but petitioner's situation does not remotely resemble those cases. There was no intimation of prosecutorial misconduct here. Petitioner neither stated the nature of the testimony that she expected to obtain from her husband, nor made any showing that it would be exculpatory. Moreover, the government's interest in refusing immunity was a compelling one, since Roy Garner had

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[4]See, *e.g.*, *United States* v. *Lenz*, 616 F. 2d 960, 962-963 (6th Cir. 1980); *United States* v. *Klauber*, 611 F. 2d 512, 517 & n.11 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *United States* v. *Housand*, 550 F. 2d 818, 824 (2d Cir.), cert. denied, 431 U.S. 970 (1977); *In re Daley*, 549 F. 2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Smith*, 436 F. 2d 787, 790 (5th Cir.), cert. denied, 402 U.S. 976 (1971).

[5]For example, in *United States* v. *Herman*, 589 F. 2d 1191, 1204 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1979), the court said that such a procedure is appropriate where the prosecutor's refusal to immunize was done with a "deliberate intention of distorting the judicial fact finding process." And in *Government of Virgin Islands* v. *Smith*, 615 F. 2d 964, 972 (3d Cir. 1980), the court found that immunity may be granted to allow for testimony essential to an effective defense, provided the defendant specifies "the particulars of the witness' testimony," and makes a "convincing showing" that the testimony "is both clearly exculpatory and essential" to his case. See *United States* v. *Lowell*, 649 F. 2d 950, 964-965 (3d Cir. 1981).

already been indicted and, indeed, subsequently pleaded guilty to two counts of the indictment (Pet. iii). This Court has consistently refused to review cases presenting more persuasive claims for immunizing a defendant's witness;[6] there is no justification for doing so here.

3. Petitioner's attack on the sufficiency of the evidence presents fact-bound questions that do not warrant further review by this Court. With respect to the wire fraud conviction, petitioner asserts that Dennis and her husband never discussed their "play" over the telephone. She also claims that the conversation in which Roy Garner asked Dennis if he intended to play during Christmas week probably took place while Roy Garner was visiting Dennis in California (Pet. 19). In fact, the conversation which Dennis said occurred in California concerned his trip to Nevada for the September 30 session at Harrah's (II Tr. 131). Dennis later testified that he had a telephone conversation with Roy Garner in December, that Garner had asked Dennis whether he received his invitation from Harrah's, and upon receiving an affirmative response, told Dennis that they were going to play (II Tr. 139-141).

Petitioner's claim regarding interstate travel is that she had no vicarious liability for Dennis's interstate travel, since the indictment did not charge conspiracy, and the proof showed two separate schemes—one involving her and her husband and one involving Dennis and her husband (Pet. 20-22). The jury, however, quite reasonably concluded that a single scheme was shown: the same modus operandi was used for petitioner's play and for Dennis's play; petitioner helped prepare Dennis to play in response to Roy Garner's signals; in her disguise as "Wilma Rogers" petitioner was

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[6]See, in addition to the cases noted in notes 4 and 5, *supra*, *United States* v. *Turkish*, 623 F. 2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981).

described by Roy Garner to Harrah's casino manager as "our other player, our other customer" (VI Tr. 21). The evidence thus supported a finding that petitioner aided and abetted Dennis's interstate travel. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619-620 (1949); *United States* v. *Ryan*, 548 F. 2d 782, 786 (9th Cir. 1976), cert. denied, 430 U.S. 965 (1977).

4. After the jury had deliberated for several hours, the court called the jurors back into the courtroom to ascertain their progress. The foreman reported that progress was slow, but that a verdict might be reached after further deliberation. The court reminded the jurors of the importance of the case to both parties and of its expense to the parties and the jurors themselves. The court then asked them to continue their deliberations and endeavor to reach a verdict if they could (see Pet. 7; Pet. App. 14). Petitioner contends that, because the court failed to instruct the jurors not to surrender their honest convictions, its remarks coerced the jury in violation of *Allen* v. *United States*, 164 U.S. 492 (1896). The contention is without merit. The court's remarks were not an *Allen* charge. There was no indication that the jurors were deadlocked. There was no instruction that the jurors should show a proper regard and deference for each other's opinions and listen to each other's arguments with a disposition to be convinced, or that dissenting jurors should ask themselves if the judgment of the larger number might not be the more reasonable. See 164 U.S. at 501. In the absence of such an instruction, there was no need for a countervailing instruction that honest convictions should not be surrendered. All that the court did here was, after reminding the jurors of the importance and cost of the case, to encourage them "if you can" to reach the verdict that the foreman said was possible. The court's remarks were thus in no way coercive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1982

DOJ-1982-03